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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

DONN C. MITCHELL.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This is the claim of a second lieutenant who served in the United States Volunteer Cavalry during the war with Spain, for extra pay under the act of January 12, 1899 (30 Stat. L., 784), as amended by the act of May 26, 1900 (31 Stat. L., 217), and pay for the exercise of higher command under section 7 of the act of April 26, 1898 (30 Stat. L., 364).

The claimant was enrolled on May 3, 1898, as second lieutenant of Troop E of the First Ohio Volunteer Cavalry, for service during the war with Spain, and served in that grade until October 20,

1898, when he was promoted to the grade of first lieutenant, and was mustered out of the United States service in the latter grade on October 23, 1898. His entire service was within the limits of the United States.

By regimental Special Orders, No. 44, dated August 24, 1898, First Lieut. William D. Forsyth, who was in command at that time of Troop E, First Ohio Volunteer Cavalry, was relieved from command in order to take an examination for appointment as second lieutenant in the Regular Army, and was ordered to turn the Government property, funds, and records of the troop over to his successor. In the same order the claimant was *appointed* to the command of Troop E, and ordered to receipt to Lieutenant Forsyth for Government property and funds belonging to the troop.

In pursuance of this order the claimant assumed command of the troop on August 26, 1898, and exercised command until the First Ohio Volunteer Cavalry was mustered out of the United States service on October 23, 1898, and during that period he received the pay of a second lieutenant of cavalry. Subsequently he filed a claim for additional pay for command of the troop, which was allowed by the Auditor for the War Department October 30, 1899, and he received the difference between the pay of a second lieutenant of cavalry and captain of cavalry for the entire period from August 26, 1898, to October 23, 1898.

On September 2, 1898, Special Orders, No. 97, were issued by command of Major-General Coppinger, in which certain assignments contemplated by General Orders, No. 86, current series A. G. O., were confirmed, and among them that of "Second Lieutenant Donn C. Mitchell as captain from August 24, 1898."

On September 14, 1898, a furlough of thirty days for the regiment to which the claimant belonged was authorized by General Orders, No. 130, A. G. O., 1898, and amendatory circulars. The claimant did not receive the benefit of a furlough. He was taken sick at Huntsville, Ala., before the furlough, but he accompanied his regiment to Columbus, Ohio, where he was placed in the hospital by officers of his regiment, the regimental surgeon being absent. While at the hospital he performed some military service by directing a clerk employed by him for that purpose. He remained sick in the hospital from the beginning of the furlough period until September 26, 1898, and from that time until the end of the furlough period, October 13, 1898, he was detailed for duty and actually performed military duty. During the whole furlough period he was at all times subject to the orders of the superior officers until final muster out.

The Auditor for the War Department recommended that in view of the decision in the case of *Humphreys* v. *The United States* (38 C. Cls. R., 689) the difference in pay between the grades of second lieutenant mounted and captain mounted

received by claimant from August 26, 1898, to October 23, 1898 ($79.44), was a proper stoppage against his one month's extra pay as of the grade of second lieutenant, so that if entitled to extra pay under the act of January 12, 1899, as amended by the act of May 26, 1900, he should receive the sum of $45.56.

The Court of Claims rendered judgment in favor of the claimant for the sum of $166.66.

ASSIGNMENT OF ERRORS.

The Court of Claims erred:

First. In holding that the claimant exercised a command above that pertaining to his grade.

Second. In holding that the claimant was serving with troops operating against an enemy.

Third. In holding that the claimant was properly assigned to the command of his company.

Fourth. In not dismissing the claimant's petition.

ARGUMENT.

I.

Extra Pay.

As the Court of Claims has made a finding of fact (finding No. 4) that the claimant was taken sick before the beginning of the furlough period, and after his recovery was detained by proper authority for the performance of military duties until the end of the furlough period, it would appear that under the rule laid down by the Court of Claims in the cases of *Charles B. Hunt* v. *The*

United States (38 C. Cls. R., 704), *Francis Magurn* v. *The United States* (39 C. Cls. R., 416), and *Edward D. Legg* v. *The United States* (40 C. Cls. R., 115), and uniformly followed by the accounting officers since the decision of those cases, he is entitled to extra pay, and the only question for this court to consider is the amount to which he is entitled.

II.

Questions Raised on Appeal.

The rank that the claimant held during the furlough period of his regiment was that of a second lieutenant of cavalry, the compensation of which is at the rate of $125 per month. Under the rule laid down by the Court of Claims in the case of *Terreil* v. *The United States* (40 C. Cls. R., 78), which has been uniformly followed by the accounting officers of the Treasury since the decision of that case, an officer held for military duty during the furlough period of his regiment is entitled to extra pay under the act of January 12, 1899, as amended by the act of May 26, 1900, at the same rate as the pay proper of the rank held by him during the furlough period.

The questions presented to the court for consideration are:

First. Whether the claimant is entitled to receive one month's extra pay of a captain of cavalry ($166.66) or one month's extra pay of a second lieutenant of cavalry ($125).

Second. If entitled to the extra pay of a second lieutenant of cavalry during the furlough period, whether the difference between the pay of a captain of cavalry and a second lieutenant of cavalry received by him ($79.44) from August 26, 1898, to October 23, 1898, or whether the difference between the pay of a captain of cavalry and a second lieutenant of cavalry received by him during the furlough period, September 14 to October 13, 1898 ($41.66), should be deducted from said extra pay.

III.

Higher Command Pay.

The act under which the claim is made for exercising a command higher than that pertaining to his grade, is that of April 26, 1898 (30 Stat., 364), which reads as follows:

> SEC. 7. That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised.

The above section embodies four conditions which must have concurred in the service of a volunteer officer, during the war with Spain, to entitle him to receive the pay and allowances provided for by the act.

1. The service must have been rendered in time of war.

This condition has unquestionably been fulfilled by the service of the claimant, as the United States at the time his services were rendered was engaged in a war with Spain.

2. The service must have been rendered with troops operating against an enemy.

3. The assignment must have been made in orders issued by competent authority.

4. The command exercised must have been above the command pertaining to the grade of the officer exercising it.

The Court of Claims in its application of the conditions imposed by the statute to the case of the claimant has seen fit to change their order, and in discussing these conditions under separate headings in this brief, the defendants have considered it wise to follow the order laid down by the Court of Claims in its opinion.

IV.

Was the Command Exercised Above that Pertaining to his Grade?

The Court of Claims in considering this branch of the case decided against the contention of the defendants upon the ground that "Congress intended to provide the compensation of the higher grade to an officer performing higher duties, if properly assigned to perform such higher duties. But with an order or without, its compensation was limited to higher duties." The Court of Claims also undertook to differentiate the case of *Truitt* (38 C. Cls. R., 398) from the case at bar. We

will endeavor to convince the court that this position of the Court of Claims is inconsistent with both the language and spirit of the statute and with its previous construction by the Court of Claims.

The Army Regulations of 1895 (in force at the time the act was past and the services rendered) provide:

> SEC. 14. The following are the commands appropriate to each grade:
>
> 1. For a captain, a company.
> 2. For a major or lieutenant-colonel, a battalion or squadron.
> 3. For a colonel, a regiment.
> 4. For a brigadier-general, two regiments.
> 5. For a major-general, four regiments.

In the case of *Humphreys* v. *The United States* (38 C. Cls. R., 689) Chief Justice Nott, who delivered the opinion of the court, said:

> It is also to be said that the term "command" in the statute refers not to the commander but to the commanded—not to rank or grade or the giving of orders, but to organized bodies of troops whose commanding officers have a certain rate of pay regulated by law. The command of a brigadier is his brigade. The command of a colonel is his regiment; the command of a captain is his company. A lieutenant-colonel has no command—that is to say, he commands no integral part of a regiment (692 and 693).

In the case of *Truitt* v. *The United States* (38 C. Cls. R., 398) the court held that an officer who is

engaged in the performance of staff duties was not exercising a higher command within the intent of section 7 of the act of April 26, 1898, altho the grade filled by him at the time was higher than his appropriate grade, and the duties performed were more onerous and difficult than the duties of his appropriate grade. The court said:

> The claimant was not "serving with troops operating against an enemy" in the sense of exercising a command over such troops, and therefore he is not entitled to recover (407).

It is very difficult to perceive from the reasoning of the Court of Claims in the case at bar, why the Truitt case is inapplicable. In this case that court held that the claimant is entitled to recover, not because he exercised a command higher than that pertaining to his grade, but because he performed higher duties. In the Truitt case the same court held that altho the claimant performed higher duties he did not exercise a higher command, and was not therefore entitled to recover.

The Army Regulations provide no command for a subaltern; the lowest officer in rank provided for in that respect is a captain. The claimant, therefore, whose grade was that of a second lieutenant of cavalry, had no command pertaining to his grade, and his case does not come within the purview of the act. He was merely a supernumerary in the company, whose authority under the regulations to exercise any command at all was contingent upon the absence of his two superior officers,

the first lieutenant and captain. It can not be said that the claimant exercised a *higher command* when in command of the troop, because in his appropriate grade he exercised *no command at all*, for if the regulations gave him any command whatever it was the contingent command of the company to which he belonged. The statute does not say that increased compensation shall be received for exercising higher duties or exercising *a command*, but for exercising *a higher command*. As the Court of Claims said in the Humphreys case, the statute does not refer to the commander, but to the troops which he commands.

V.

Was the Claimant Serving with Troops Operating Against an Enemy?

During the war with Spain there were established in the United States a number of camps for the instruction of volunteers in the performance of military duties and the arts of war. Some of the regiments, after having undergone a course of military instruction at these camps, were transferred to the seat of war, some to coast defenses, and some were sent home to be mustered out of the United States service. The words employed in the act, "operating against an enemy," clearly indicate operations defensive in their character, and are inapplicable to the course of training received by volunteer troops at camps of instruction, where

they were being prepared for operations against the enemy.

The troops assembled at camps of instruction were not there "for the purpose of carrying on and bringing to a conclusion the war with Spain," but were simply there for the purpose of receiving military instruction. Some of them were to be selected for their efficiency and sent to the front, while some of them, for whom there was no particular use at the time, were sent home for muster out of the United States service. Troops stationed in the defenses along the Atlantic coast might very properly have been considered as constructively "operating against an enemy," especially in view of the fact that the Spanish fleet was for a time at large upon the seas and its location unknown to the United States authorities.

Camp Wheeler, Huntsville, Ala., where the claimant's services were performed, was situated in the interior of the country, far from any prospective operations against the enemy; and aside from the fact that the troops had volunteered for the Spanish war, they were no more "operating against an enemy" than were the troops stationed at Fort Leavenworth, Kans., or the cadets undergoing instructions at West Point or Annapolis. The officers stationed at Huntsville experienced none of the dangers or hardships incident to a period of actual hostilities, and the responsibilities of higher command were no greater than in ordinary times of peace.

In the *Truitt case* (*supra*), the court, in construing this act, speaking of the services of a staff officer, said:

> The evident purpose of the act was to compensate officers "serving with troops operating against an enemy" for the greater risk and responsibility attending the command which they may have exercised above that pertaining to their grade (407).

In regard to the claimant's right to pay for the exercise of a higher command, a distinction should be drawn between the time he was serving in the camp of instruction at Huntsville, Ala., and the furlough period of his regiment, which began September 14, 1898, and terminated October 13, 1898. From the beginning of this period until September 26, 1898, the claimant was sick in the hospital, and afterwards, until the end of the furlough period, the enlisted men of the company being at home upon furlough, he was engaged in the performance of clerical duties, which, as was said in the *Truitt case* (*supra*), did not entitle him to higher pay, and in addition to which, instead of serving with troops operating against an enemy and encountering the increased risk and responsibility, he was simply engaged in settling up the accounts of the company, preparatory to his discharge from the United States service.

From the beginning of the furlough period until the final muster out of the regiment, the troops were not *operating against an enemy*, nor was the

claimant in command of his troop within the intent of section 7 of the act of April 26, 1898.

In the case of *William R. Collins* v. *The United States*, No. 22571, decided by the Court of Claims May 25, 1903 (not reported), claim was made by a first lieutenant of Company M, First Ohio Volunteer Infantry, for the exercise of higher command while in command of his company from the beginning of the furlough period to muster out. That was a much stronger case than the case at bar, inasmuch as the troops were kept at their armory in Cincinnati and their organization preserved. Nevertheless, the Court of Claims in that case refused to grant the higher pay claimed.

VI.

Was the Assignment in Orders Issued by Competent Authority?

The claimant, at the time he assumed command of his company, August 26, 1898, was the senior officer present, and as such, in the absence of his captain and first lieutenant, succeeded to the command by virtue of the Regulations.

Section 253 of the Army Regulations of 1895 (in force when the act was past and the services rendered) provides that:

> In the absence of its captain, the command of the company devolves upon the subaltern next in rank who is serving with it, *unless otherwise specially directed.*

Special Orders, No. 44, dated August 24, 1898 (Rec., pp. 2 and 3), were issued by order of

Lieutenant-Colonel Day of the First Ohio Volunteer Cavalry for the purpose of relieving First Lieut. William D. Forsyth (who was then commanding Troop E) from his command, and directed him to turn over the property, funds, and records of the troop to his successor. The *appointment* of Second-Lieutenant Mitchell (the claimant) to the command of the troop appears to have been only made as an incident to the order relieving Lieutenant Forsyth of the command, and having been entirely unnecessary, could in no sense be considered as an assignment in orders issued by competent authority within the meaning of section 7 of the act of April 26, 1898. The word *appointment* instead of *assignment* appears to have been used with the evident purpose of preventing a mistake as to the meaning and intent of the order.

There was an attempted confirmation of the *appointment* of the claimant to the command of his company by Special Orders, No. 97, dated September 2, 1898, issued by command of Major-General Coppinger, confirming "the assignment thereto contemplated by General Orders, No. 86, current series, Adjutant-General's Office." (Rec., p. 3.) General Orders, No. 86, July 2, 1898, Adjutant General's Office (in force at the time of the issuance of Special Orders, Nos. 44 and 97), embodying an opinion by the Attorney-General, uses this language:

> To entitle an officer to the pay of a grade above that actually held by him, the assign-

> ment in orders, under the clause cited, must be by the written order of the commanding general in the field or the Secretary of War, and no pay or allowances of a higher grade than that actually held by an officer will be paid under this provision, except when a certified copy, in duplicate, of such order, with statement of service, is filed with the paymaster. (Rec., pp. 3–4.)

Under General Orders, No. 86, the assignment of the claimant to the command of his company could have been legally ordered only by the commanding general in the field or the Secretary of War, and a certified copy in duplicate should have been filed with the paymaster in order to entitle him to the higher pay. The general order also, from language used, evidently contemplated the issuance of the order of assignment prior to the assumption of the higher command. Therefore, the claimant never having been properly assigned within the meaning of the act of April 26, 1898, or of General Orders, No. 86, there could have been no valid confirmation. Nor were certified copies, in duplicate, of Special Orders, Nos. 44 and 97, filed with the paymaster, as required.

The commanding general in the field had no power to delegate his authority to assign an officer to a higher command, nor had he the power to subsequently confirm and ratify such unauthorized action by any officer under his command.

Admitting, however, for the sake of argument, that regimental Special Orders, No. 44, were cor-

rect in form and issued by competent authority, as contemplated by section 7 of the act of April 26, 1898, still, having been entirely unnecessary and superfluous, they could have been issued for but one purpose alone—that of giving the increased pay provided by the act. It was against just such expedients as this that the opinion of the Court of Claims, delivered by the chief justice, was principally directed in the case of *Humphreys* v. *The United States* (*supra*), where the court, after discussing the rule of succession by seniority, goes on to say:

> But in none of these cases is an "assignment in orders issued by competent authority" necessary. These additional duties are neither honors nor burdens placed upon the officer by competent authority; they are the ordinary incidental duties of military official life which go with each officer's commission.
>
> It seems to the court incontrovertible that the words "under assignment in orders issued by competent authority" constitute the controlling limitation of the statute; and the limitation implies that the benefits of the statute extend only to cases where such an order is necessary to impose the burden of a higher command upon an officer. Where a colonel is assigned to the command of a brigade, or where a lieutenant-colonel is assigned to the command of another regiment than his own, there will be a case coming within the intent of the statute (p. 692).

In the ordinary course of military affairs it is unquestionably true that the rule of succession by seniority prevails. The regulations provide that such shall be the case, and the practise adopted in carrying the regulations into effect has been uniform. Therefore, if as the attorneys for the claimant contended when the case was argued in the court below, no case can arise where an assignment under orders, issued by competent authority, contrary to the rule of seniority can be otherwise than made in violation of the regulations, it would seem to follow that the words "under assignment in orders issued by competent authority," which have been said by the Court of Claims in the Humphreys case to "constitute the controlling limitation of the statute," were entirely unnecessary and superfluous, and are without meaning or legal effect. The contention of the claimant's attorneys that unless the assignments are made in accordance with the seniority rule they are made in violation of the regulations is denied, especially in this case, as section 253 (*supra*) of the regulations provides that the seniority rule shall prevail "*unless otherwise specially directed.*"

Had the captain of the company been absent, and both the first and second lieutenants been present, and had the second lieutenant been assigned to the command of the company over the head of the first lieutenant, then the seniority rule would have been violated, altho such action would have been in strict conformity to both section 7 of

the act of April 26, 1898, and the Army Regulations. Section 253 of the regulations provides for exceptions to the seniority rule in special cases, and it was toward just such cases that section 7 of the act of April 26, 1898, was directed, by providing the manner in which the exceptions shall be carried into effect.

It may be said that any provision of a statute intended to vary the usual and ordinary rule of seniority prescribed by the regulations is of an extraordinary character, and this is undoubtedly true, as such acts are evidently intended to provide only for extraordinary occasions and are not enacted for the purpose of unnecessarily increasing the cost of the war establishment of the Government.

The seniority rule, having grown up by custom in the Army, was afterwards embodied in the regulations, and was considered too sacred many years ago to be varied, except on occasions of the greatest military necessity.

During the civil war (April 4, 1862) a resolution was enacted "to authorize the President to assign the command of troops in the same field or department to officers of the same grade, without regard to seniority." This resolution was repealed by the act of July 17, 1866, ch. 176, sec. 5 (14 Stat., 92).

Assignments which Congress has so jealously guarded as to permit only the President himself in time of war to make, would hardly, many years afterwards, be delegated by that body to a colonel

of volunteers; still less would it permit an officer of that rank to supersede at will the seniority rule.

The Court of Claims in deciding this case said:

> The court is of opinion that any construction which permits the pay of two or three generals or a dozen colonels or a hundred captains, as the case may be, to be duplicated, as temporary absences occur, without some necessity for orders in assignment, is liable to produce abuses never contemplated by the lawmakers. Gratuitous assignments could never serve any purpose except to increase the pay.

And as was said by Judge Nott, in deciding the Humphrey case, "what the law contemplated his doing was to make necessary and not gratuitous assignments."

CONCLUSION.

This being a comparatively recent act, there can, of course, have been no long-continued construction by the Treasury Department. That the construction has not been uniform is evidenced by the fact that the Department has held both ways; however, since the decision of the Court of Claims in the Humphreys case, May 25, 1903, it has held uniformly and consistently to the rule laid down therein.

Respectfully submitted.

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